of a confusion between the two business establishments. It is my finding on the facts that the defendant business name is not calculated to deceive so as to divert business from the plaintiff company to the defendant, or occasion a confusion between the two businesses. The managing director of the plaintiff company (PW1) gives two reasons why the company has brought the present suit. Firstly, the plaintiff has spent a lot of time, effort and money to associate "Mun Loong" with the company, and, secondly, the plaintiff company fears that if the defendant firm went out of business, the plaintiff's name might be tarnished as some creditors might confuse the defendant's business name with the plaintiff company. In my view, both reasons are not really relevant for the purpose of determining the present dispute. Since both parties carry on different type of business, in the absence of proof that the defendant has done something deceitful or dishonest, the injunction sought should not be granted.

For the above reasons, I dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Skrine & Co.; Chooi & Co.*

HAMZAH BIN MUSA v. FATIMAH ZAHARAH BINTI MOHAMED JALAL

[A.C.J. (Mohamed Zahir J.) July 22 & November 25, 1981]
[Kota Bharu — Civil Appeal No. 19 of 1980]

Contract — Agreement by Muslim husband to pay wife $5,000 if he divorces her — Whether contract can be enforced in Magistrate's Court — Whether contract is immoral or opposed to public policy — Contract Act, 1950, s. 24.

Islamic Law — Agreement by Muslim husband to pay wife $5,000 if he divorces her — Whether enforceable in civil court — Kelantan Shairyah Courts and Muslim Matrimonial Causes Enactment, 1966, ss. 9 & 60.

In this case the appellant on marrying the respondent had agreed to pay her $5,000 if he divorced her. Subsequently the appellant divorced the respondent and she claimed the sum of $5,000. The learned Magistrate gave judgment in favour of the respondent and the appellant appealed.

Held: (1) the learned Magistrate had jurisdiction to hear the case;

(2) the contract in this case was not immoral or opposed to public policy under section 24 of the Contract Act, 1950;

(3) in this case the appellant had agreed to marry the respondent on the stipulation that if he were to divorce her he would pay her $5,000. She had fulfilled her term of the obligation by marrying him and upon divorcing her, the appellant was obliged to fulfil his term of the contract.

Cases referred to:-

(1) *Nafsiah* v. *Abdul Majid* [1969] 2 M.L.J. 174.

(2) *Sak'amah binte Saridin* v. *Tasmin bin Abdul Samad* [1938] M.L.J. 38.

CIVIL APPEAL.

P. Dorairaj for the appellant.

M.S. Nayagam for the respondent.

Cur. Adv. Vult.

Mohamed Zahir J.: The defendant is appealing against the decision of the Magistrate ordering him to pay the sum of $5,000 being the amount due as a result of a breach of an undertaking given by the defendant to his ex-wife, the plaintiff, that he would not divorce the plaintiff and that if he did so he would pay her $5,000.

In the trial below, the defendant did not dispute the undertaking but averred that the undertaking was unenforceable as it was in violation of the provisions of Islamic law. The defendant further pleaded that any remedy after the divorce should be in the Kadhi's Court as both parties are Muslims.

According to the evidence it was the defendant, a school teacher, who prepared the undertaking. It is termed as "Surat Perjanjian" which reads as follows: —

"Bahawa adalah saya Hamzah bin Musa, KP. No. 0839666, tinggal di Kampong Kelubi, Jalan Machang, Pasir Puteh, Kelantan, dengan sesungguhnya serta dengan hati yang suci mengaku bahawa:—

Saya bersetuju pada perjanjian yang telah saya buat dengan isteri saya Fatimah Zaharah binti Mohd. Jalal KP. No. 1533783, tinggal di Kampong Pauh Lima, Bachok, Kelantan. Saya tidak akan cerainya, sekiranya saya cerai isteri saya Fatimah Zaharah binti Mohd. Jalal ini saya akan didaawa dan dibayar sebanyak $5,000.

Tertulis pada 25hb. December, 1976.

Adalah saya yang benar
(HAMZAH BIN MUSA)"

The brief history of the couple is rather tragic. The defendant was married nine times and had divorced his wives nine times and had 8 children. One of his wives was the plaintiff and she was divorced by him three times. After her third divorce the plaintiff became pregnant. According to the defendant, he had to remarry her in the interest of the child. But after divorcing her the third time, the defendant had no further right to "rujuk" or claim back the plaintiff as his wife as he was entitled to do after the first two divorces. According to the Muslim law, after the third divorce the woman must first remarry another person in a proper marriage ceremony and if she is again divorced by the new husband, then she would be at liberty to remarry the former husband.

To circumvent this restriction of the religious law, the parties, according to the evidence, went into the shady marriage ceremony which is called "Cina Buta". This was done by the parties making an arrangement with another man who was willing to marry the woman on condition that after the marriage had been solemnised, the man would divorce the woman and the former husband would then be able to remarry the woman after the eddah period when a divorced woman can remarry. This practice is being frowned by most Muslims as an attempt to circumvent the religious law. The practice is at present on the decline in Malaya as compared to many years ago. But it is none-the-less still being practised by the short tempered couples and hasty decision-making husbands who later regret their decision. Feeling that they must marry and live together again for the sake of their children or for love alone or for whatever reason, some couples would be prepared to undergo the "Cina Buta" ceremony however much distasteful it is.

The defence counsel in arguing the appeal before me submitted that the Magistrate has no jurisdiction

to hear the case and quoted *An Introduction to the Constitution of Malaysia* by Tun Suffian at page 99. He also quoted section 9 of the *Shariyah Courts and Muslim Matrimonial Causes Enactment 1966*. This section enunciates the powers of the Shariyah Court to hear and determine all actions and proceedings in which all the parties profess the Islamic religion and which relate to:

"(i) betrothal, marriage (including ta'at balek) divorce, nullity of marriage or judicial separation;

(ii) any disposition of, or claim to, property arising out of any of the matters set out in sub-paragraph (i) of this paragraph."

On this point the learned Magistrate ruled that the question of jurisdiction depended entirely on the document, whether contractual or not. He was of the opinion that since this matter came under the Contracts Act 1960, only the Adat Court (Courts established under Courts of Judicature Act 1964 and Subordinate Courts Act 1948) has jurisdiction. I am, however, of the different view. There are matters under the Contracts Act 1950 which can as well be adjudicated by the Shariyah Court. Section 9(b)(ii) of the Shariyah Courts Enactment 1966 clearly envisages contracts under the Contracts Act 1950 such as claims of properties made in pursuance or related to betrothals, marriages or divorces and also cases under section 9(b)(vii) which relates to settlements with or without consideration.

There are certain cases which the Shariyah Court and Civil Court are having concurrent jurisdiction. For instance, claims for "harta sepencarian", wakaf or nazar which are also being heard in the High Court. It is up to the plaintiff to choose whichever court he or she feels that would give more advantages. For instance, the Shariyah Court in a "harta sepencarian" case, cannot order specific performance of half share of any land since the Shariyah Court has no power to issue an order for specific performance. He or she may only claim the equivalent value in money.

Claims for breach of promise to marry can be initiated in both Adat Court or Shariyah Court. But if it is initiated in the Subordinate Court, it appears to me that the man cannot claim the dowry if paid as dowry is exclusively a matter for Shariyah Court. He may claim for reimbursement of expenses incurred and general damages. But section 60 of the Kelantan Shariyah Courts Enactment provides as follows: —

"... the party in default shall be liable, if a male, to pay as damages the amount of the mas-kahwin which would have been payable together with other monies expended in good faith in preparation for the marriage, or, if a female, to return the betrothal gifts, if any, or the value thereof and to pay as damages the amount of such other monies as aforesaid, and the same may be recovered by action in the court."

"Court" here means the Kadhi's or Chief Kadhi's Court or the Court of Jumaah Pengadilan which is the Shariyah's ultimate appeal court. Thus, in Kadhi's Court the claimant may also make a claim in respect of dowry as well as damages.

There are, however, cases which although they may well come under the Contracts Act, are under the exclusive province of the Shariyah Court. For instance, a case where there is agreement by a party to a marriage to defer the payment of dowry to a later date. Since dowry is a requirement in the Muslim law in marriage, the matter would be properly adjudicated by the Shariyah Court. But if the husband were to contract with the wife or would-be wife to give her a piece of land in the event of a divorce specifically not as a dowry, then this matter can be adjudicated by an Adat Court. The instant case comes under this category. In this case, the sum of $5,000 was never intended to be a dowry which according to the evidence had been settled.

There are, however, cases under the exclusive jurisdiction of the Adat Court where the parties may have been husband and wife but what they agree upon may not have anything to do with the Shariyah law which should be confined to those parts of the Muslim law enacted under the various State Enactments intended to be administered by the various State religious departments or courts. Other Muslim laws such as distribution of Muslim estates or even murder, robbery and theft which are also provided by the Muslim law are being adjudicated by the Adat Courts. Maintenance of Muslim children and widows which before was under the Adat Court, has now been transferred to the exclusive jurisdiction of Shariyah Court.

Another question to be decided here as submitted by counsel for the defendant is that the contract is immoral or opposed to public policy under section 24 of the Contract Act. There are cases where the court refused to enforce agreements as being against public policy where the objects of the agreements are illegal. *Chitty* on Contracts, 24th Edition at paragraph 904 has this to say on the scope of public policy:

"Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five grounds: first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to family life; and fifthly, objects economically against the public interest."

The only category under which this case may be considered is perhaps it is injurious to family life. It is not against any established law, for there is no law in the Muslim religion that prohibits a wife or would-be wife entering into a contract with her husband. But an agreement entered into before marriage by which it is provided that the wife should be at liberty to live with her parents is void, as under the Muslim law the wife must live with her husband. Similarly, an agreement entered into after marriage between a husband and wife who were for some time before the date of the agreement living apart from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, she should be free to leave him, is void. But an agreement to allow a second wife to live in a separate house and to give her a maintenance allowance has been enforced (see *Mulla* on Principles of Mahomedan Law, 17th Ed. page 275).

Claims for damages by a woman for breach of contract to marry for the return of monies expended are enforceable (see *Nafsiah* v. *Abdul Majid*[1]).

Thus, whether these contracts are enforceable or not would depend entirely on the object of the con-

tracts. An agreement contemporary with the marriage whereby the husband undertook not to ill-treat his wife and also agreed that the wife would be entitled to claim the customary maintenance allowance if relations between them became strained is not void as being against public policy (see *Pollock* on Indian Contract and Specific Relief Acts, 8th Ed. page 171).

In *Sak'amah binte Saridin* v. *Tasmin bin Abdul Samad*,[2] the parties being husband and wife entered into a contract wherein the wife agreed to transfer a piece of land held in trust by her in favour of her husband in the event she asked for a divorce from her husband. She did ask for a divorce and the ex-husband claimed for the transfer of the land to him. It was held by Cussen J.:

"the agreement as to the disposition of the property in the event of divorce was consonant with the principles of Muhammadan law and custom among Malays and was therefore a perfectly legal one."

Another ground of appeal is that the document is not a "Surat Akuan" as in the sense of statutory declaration. It is admittedly not a statutory declaration. It is a contract in which the plaintiff agreed to marry the defendant on the stipulation that if he were to divorce her to pay her $5,000. She had fulfilled her term of the obligation by marrying him and upon divorcing her, the defendant is obliged to fulfil his term of the contract.

I dismiss the appeal with costs. The $150 deposit paid by the appellant be paid to the respondent as part of the costs.

Appeal dismissed.

Solicitors: *Dorairaj & Co.; Nayagam & Co.*

TEOH SUAN ENG v. LEW MENG SHIN & ANOR.

[O.C.J. (George J.) December 4, 1981]

[Raub — Civil Suit No. 6 of 1980]

Tort — Road Accident — Damages — Spinal cord — Injury resulting in paraplegia — Damages for pain and suffering and loss of amenities — Inflation.

In this case the plaintiff sustained injuries as a result of a road accident and suffered a fracture of the first lumbar vertebra and injury to her spinal cord that has resulted in the plaintiff suffering from paraplegia. Liability in negligence was admitted.

Held: (1) the plaintiff would be awarded for loss of earnings the sum of $14,400 on the basis of $240 for 60 months and for future loss of earnings the sum of $22,300 using $240 as a basis against a multiplier of 10 years;

(2) the plaintiff is entitled to the sum of $150 per month for nursing care, that is $9,000 up to the date of judgment and for the future, applying the tables, $13,900;

(3) taking into account the discernible trend in the awards in the cases involving paralysis and taking into account inflation, the award for the pain and suffering and loss of amenities should be $75,000.

Cases referred to:-

(1) *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee* [1970] 2 M.L.J. 151.

(2) *Oliver* v. *Ashman* [1961] 3 All E.R. 323.

[The following cases were also referred to: *Hamid bin Awang* v. *Yeo Kim Kuan* [1966] 1 M.L.J. 129; *Quek Poh Ser & Anor.* v. *Jhagir Singh* [1962] M.L.J. lxxxviii; *Yio Yak Kiang* v. *Green Bus Co.* [1967] 1 M.L.J. lxi.]

CIVIL SUIT.

G. Varghese for the plaintiff.

S.P. Veloo for the defendant.

Cur. Adv. Vult.

George J.: On the morning of September 25, 1976 the plaintiff was travelling as a passenger in a motor bus that was proceeding from the Casino and Hotel Complex at Genting Highlands towards Kuala Lumpur when the bus went off the road as a result of which the plaintiff suffered a fracture of the first lumbar vertebra and injury to her spinal cord that has resulted in the plaintiff suffering from paraplegia. The plaintiff had testified that she has no control over movements of her bowel and bladder. The paucity of information in the medical report has been the subject of justified criticism by learned counsel for the defence and has caused me more than a little anxiety on whether I should hold that in fact the plaintiff is a paraplegic for life and whether her disabilities include lack of control over the excretory organs. Fortunately for the plaintiff the medical report has a reference to treatment for "bowel and bladder care". My attention was drawn to the reference on "paraplegia" at 304 of the *Short Encyclopaedia of Medicine for Lawyers by Levitt* where it is stated that in the paralysis known as paraplegia the bladder and rectum are often involved in the paralysis. As the reflexes of micturition and defecation are controlled by the spinal cord at the first lumbar vertebra level and since the plaintiff was treated for bowel and bladder care the probabilities are, by a nose as it were, in favour of the contention that the plaintiff did in fact suffer a lack of control of those excretory functions. My forced researches into the realms of medicine suggest that where there is paralysis as a result of injury to the spinal cord and there is no significant improvement in the condition in the first few months after the occurrence of the injury the probabilities are that the disabilities would be permanent which appears to be the condition of the plaintiff. I am constrained to say that I can think of no excuse for the legal advisers of the plaintiff resting their case on a one line badly worded medical report.

Liability in negligence having been admitted by the defendants I am left with having to adjudicate on the quantum of compensation.

In respect of the claim for special damages the parties have not been able to agree on loss of earnings by the plaintiff and on the costs of alleged nursing care. In respect of all the other items claimed as specials agreement was arrived at in the sum of $4,877.

Since 1970 the plaintiff had worked as a clerk for one Chin Radio (Kedah) Sdn. Bhd. attending on customers who had service problems in respect of their radios and television sets and other electrical equipment. She had started at a basic salary of $85 per month and was supplied food and lodging. There were yearly increments and when the accident hap-